

Decision 01-08-070 August 23, 2001

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of Pacific Gas and Electric Company (U 39M) for Approval of Leases to Allow CalPeak Power, LLC To Site Generator Plants on Utility Owned Land Adjacent to Substations.

Application 01-06-043
(Filed June 25, 2001)

**OPINION GRANTING APPROVAL UNDER PUBLIC UTILITIES
CODE SECTION 853(b) FOR LEASES OF UTILITY PROPERTY
AND ORDER TO SHOW CAUSE**

Summary

We grant the request of Pacific Gas & Electric Company (PG&E) for a limited exemption from the requirements of Public Utilities Code Section 851¹ for the lease of space at three substations for the installation of electric generation units. We also give notice to PG&E that we will consider sanctions against PG&E for its possible violation of California law and Commission authorities.

Background

PG&E filed an application under Section 851 on June 25, 2001 to lease PG&E-owned land adjacent to three PG&E substations to CalPeak Power LLC

¹ All statutory references are to the Public Utilities Code, unless otherwise noted.

(CalPeak) for installation and operation of electric generation units.² The three substations are Vaca Dixon in Solano County, Panoche in Fresno County, and Midway in Kern County. PG&E requested that the Commission grant an exemption from the requirements of Section 851, as permitted under

² Leases of utility property such as those requested by the Application require approval of the Commission under Section 851. Transactions that do not obtain the required review and approval of the Commission under Section 851 are void. Section 851 reads:

No public utility other than a common carrier by railroad subject to Part I of the Interstate Commerce Act (Title 49, U.S.C.) shall sell, lease, assign, mortgage, or otherwise dispose of or encumber the whole or any part of its railroad, street railroad, line, plant, system, or other property necessary or useful in the performance of its duties to the public, or any franchise or permit or any right thereunder, nor by any means whatsoever, directly or indirectly, merge or consolidate its railroad, street railroad, line, plant, system, or other property, or franchises or permits or any part thereof, with any other public utility, without first having secured from the commission an order authorizing it so to do. Every such sale, lease, assignment, mortgage, disposition, encumbrance, merger, or consolidation made other than in accordance with the order of the commission authorizing it is void. The permission and approval of the commission to the exercise of a franchise or permit under Article 1 (commencing with Section 1001) of Chapter 5 of this part, or the sale, lease, assignment, mortgage, or other disposition or encumbrance of a franchise or permit under this article shall not revive or validate any lapsed or invalid franchise or permit, or enlarge or add to the powers or privileges contained in the grant of any franchise or permit, or waive any forfeiture. Nothing in this section shall prevent the sale, lease, encumbrance or other disposition by any public utility of property which is not necessary or useful in the performance of its duties to the public, and any disposition of property by a public utility shall be conclusively presumed to be of property which is not useful or necessary in the performance of its duties to the public, as to any purchaser, lessee or encumbrancer dealing with such property in good faith for value; provided, however, that nothing in this section shall apply to the interchange of equipment in the regular course of transportation between connecting common carriers.

Section 853(b).³ PG&E's Application also requested an immediate interim order, confirming that PG&E's proposal to allow CalPeak to perform preliminary site preparation was proper under General Order (GO) 69-C, or exempting the preliminary site preparation agreement from Section 851 review.

Administrative Law Judge (ALJ) Allen issued a Ruling on July 13, 2001, which requested additional information from PG&E, denied PG&E's request for authority to perform site preparation work, and granted PG&E's request for a waiver of the requirements of Rule 36(b).⁴

PG&E filed its Response to the ALJ Ruling on July 19, 2001. In its Response, PG&E provided the information requested by the Ruling. PG&E also indicated that it had mistakenly allowed CalPeak to begin site preparation work on the Panoche site on July 6, 2001, contrary to the ALJ Ruling.

³ Section 853(b) reads:

(b) The commission may from time to time by order or rule, and subject to those terms and conditions as may be prescribed therein, exempt any public utility or class of public utility from this article if it finds that the application thereof with respect to the public utility or class of public utility is not necessary in the public interest. The commission may establish rules or impose requirements deemed necessary to protect the interest of the customers or subscribers of the public utility or class of public utility exempted under this subdivision. These rules or requirements may include, but are not limited to, notification of a proposed sale or transfer of assets or stock and provision for refunds or credits to customers or subscribers.

⁴ Rule 36(b) of the Commission's Rules of Practice and Procedure requires that copies of proposed leases be filed with applications seeking Commission approval under Section 851.

CalPeak subsequently filed emergency motions requesting authority to proceed with construction of its generation units at the Panoche and Vaca-Dixon sites.

Discussion

We have considered the Application of PG&E and PG&E's Response to the ALJ Ruling, the filings of CalPeak, and applicable authorities, including the Commission's recent decision in A.01-04-015 (D.01-06-006). The Commission received no protests to the Application.

As filed, PG&E's Application provided inadequate information for the Commission to render a decision. ALJ Allen requested further information from PG&E, specifically:

- (1) More detailed descriptions of the utility properties upon which the generation units will be placed, including the size, location, and uses of the properties.
- (2) A description of the portion of each property that will be leased to CalPeak, including its size, location on the utility property, and current uses.
- (3) A description of the site preparation work that will need to be performed, including identification of any utility facilities that will require relocation.
- (4) A clear and unequivocal statement that none of the costs of the installation and operation of the generation units, including site preparation, will be borne by PG&E ratepayers.

PG&E provided the requested information in its Response to the Ruling.

We note that PG&E's Application is factually very similar to that filed by San Diego Gas & Electric (SDG&E) in A.01-04-015, which the Commission approved in D.01-06-006. In that proceeding, SDG&E requested authority from

the Commission to lease space at two of its substations for peaking units to be installed and operated by CalPeak. The Commission granted SDG&E an exemption from the requirements of Section 851, finding that the need to bring additional generation on line quickly, along with the conditions placed on the exemption, rendered that approach to be in the public interest.

Because the facts in this case are similar to the SDG&E case as far as the type of transaction and the state's continued need for electric generation, we will take a similar approach to that taken in D.01-06-006. There are, however, some key differences relating to PG&E's behavior, as compared to that of SDG&E, which we discuss further below.

As in the case of SDG&E, there are a number of reasons to grant PG&E's request for an exemption from the requirements of Section 851 under Section 853(b). First and foremost, PG&E is correct that California needs to have additional generation units on-line as soon as possible. PG&E's Application specifically seeks authority to lease property for installation of additional generation units. Accordingly, the Application responds to a pressing need, for which time is critical. In this case, the Commission can grant an exemption under Section 853(b) faster than it can grant approval under Section 851. We note that this may not be true in every case, but it is true here for a number of reasons, including the fact that the leases in question had not been executed on the date the Application was filed.⁵

⁵ PG&E filed a Motion with its Application, requesting waiver of the requirement of the Commission's Rule 36 requirement that copies of the leases be filed with the Application. PG&E stated that the leases had not been finalized, but were still in negotiation at that time.

In its emergency motion dated July 27, 2001, CalPeak requested authorization to proceed with construction of its generating facility at the Panoche substation. CalPeak stated that the scheduled operating availability date is September 26, 2001,⁶ and that maintaining the timeline was critical to the success of the project. According to CalPeak, “[T]he output from the CalPeak facility will be sold to the California Department of Water Resources (DWR) to help meet California’s emergency need for additional generating capacity.” CalPeak argued that the urgency of the situation and the unprotested status of the Application justified prompt action by the Commission, and that delay in the availability of the plant’s output would cause harm to California in the form of reduced availability of electric generation and exposure to higher prices. CalPeak made similar arguments in its August 13, 2001 emergency motion relating to the Vaca-Dixon site, which has a scheduled commercial operation date of October 16, 2001.

Second, the relief sought is very limited. PG&E is only requesting exemption from the requirements of Section 851 for leasing of three small parcels located on existing utility facilities. Section 853(b) allows the Commission to make any exemption to Section 851 subject to specific terms and conditions, and the Commission may also “establish rules or impose requirements” as necessary to protect utility ratepayers, and we will do so here. Consistent with the approach we adopted in D.01-06-006, we will limit the authority granted to PG&E to the three leases described in the Application.

⁶ CalPeak’s motion indicates that September 26 is the scheduled date for operations, but the declaration of Mark Lyons states that September 15 is the correct date.

Third, PG&E has given assurances that siting the CalPeak units on PG&E property will not interfere with PG&E's provision of service, and will generate revenue, as well as increase electricity supply.⁷

Finally, there were no protests to the Application.

From the record before us, it appears that there are specific and significant benefits to be gained from expediting approval of the Application. No specific drawbacks or problems with granting an exemption from Section 851 were identified here. At the same time, however, the Commission takes seriously its duty under Section 851 to ensure that sales, leases, and other encumbrances of utility property are in the public interest. Exemptions from Section 851, even with the safeguards of Section 853(b), will not be granted lightly, nor should they be any broader than necessary. Accordingly, while we are granting the requested exemption from Section 851, we will impose limits on the scope of that exemption.

The exemption to Section 851 that we grant today, as authorized by Section 853(b), is limited to the three leases identified in the Application, for the sites and leasehold interests described in the Application and PG&E's July 19 Response, and for the purpose of installing and operating electric generation

⁷ Under the leases, CalPeak will bear the cost of installing and operating the proposed generation units. PG&E states that the proposed leases include indemnities and protections specifically designed to protect ratepayers, including the following: (1) CalPeak is required to pay for all costs and other obligations associated with repair, maintenance, operation, and insurance of the properties, including all taxes and fees, (2) CalPeak is also responsible for all environmental remediation work that is required as a result of CalPeak's operation's on the property, (3) CalPeak must also bear the expense of any added cost associated with PG&E's expansion of PG&E's substation facilities if such cost would not have otherwise been incurred and CalPeak will indemnify PG&E for any loss associated with its use of PG&E's premises.

Footnote continued on next page

units. The Commission maintains its jurisdiction over PG&E and its facilities, and does not exempt any other leases from the requirements of Section 851, even if they are similar or related to the ones approved here. In addition, we retain our authority over the ratemaking treatment to be accorded to any revenue stream from the leases, and this decision does not authorize PG&E to incur any ratepayer liability or spend any ratepayer funds.⁸ With these limitations, and given the current desirability of expediting the siting of new generation, we find that an exemption from Section 851, as authorized by Section 853(b), is in the public interest.

Given that we are granting an exemption from Section 851, we cannot and do not review the actual leases or their terms. As a result, CEQA is not applicable to the present proceeding. The CEQA Guidelines describe the general concepts of CEQA applicability, including the following language: “CEQA applies to governmental action. This action may involve...(3) Private activities which require approval from a governmental agency.” CEQA Guideline 15002(b)(3), emphasis added. (*See also*, Public Resources Codes § 21001.1.) By granting an exemption from Section 851, we are holding that PG&E does not

⁸ While CalPeak has agreed to pay for interconnection costs, PG&E states that a recent order of the Federal Energy Regulatory Commission (FERC) could result in certain interconnection costs being rolled into rates. We do not make any finding relating to that order or the scope of the Commission’s jurisdiction vis-à-vis FERC, other than to note that this decision is not intended to cede any jurisdiction that the Commission currently maintains.

require Commission approval for the identified proposals. Since Commission approval is not required, neither is CEQA review.⁹

Concerns With PG&E's Actions

PG&E has not adequately explained why its Application was filed so late. PG&E has known about the CalPeak projects for some time. According to PG&E, it identified the three sites last summer as being well-suited to accommodate

⁹ PG&E makes credible arguments that one or more CEQA exemptions would apply even if we were to approve the Application under Section 851, but we need not reach that issue here.

generation facilities, and CalPeak and PG&E have been discussing how to incorporate CalPeak's generation units into the three PG&E sites. CalPeak has already received land use permits from Solano and Fresno County Planning Commissions.¹⁰ PG&E states that PG&E and CalPeak did not want to delay filing of the Application until after the leases were executed. PG&E's failure to file before June 25, 2001 is at best baffling, and has put both CalPeak and the Commission in unnecessarily difficult positions.

In its Application, PG&E requested that the Commission authorize site preparation work by CalPeak under GO 69-C. According to PG&E, on July 6, 2001, before it obtained any authorization, PG&E mistakenly allowed CalPeak to begin site preparation work on the Panoche site. The July 13 ALJ Ruling denied PG&E's request. PG&E states that it discovered its mistake and ordered CalPeak to cease site preparation activities on July 16. While we appreciate PG&E's candor in this regard, and understand that PG&E asserts that its allowing CalPeak to perform construction on its property was inadvertent, we are troubled by the fact that it happened, contrary to both PG&E's pleading and the ALJ's Ruling.

If this were an isolated incident, it would not be too alarming, although it could still constitute a violation of Rule 1, GO 69-C, or Section 851. In the context of other proceedings and recent Commission decisions, it becomes part of what appears to be a larger pattern that needs to be addressed.

¹⁰ An attachment to PG&E's Response, the Local Agency Notice of Determination for the Panoche project, indicates that the negative declaration for the project was published on March 23, 2001, and yet PG&E did not file its (incomplete) Application until June 25, 2001.

In proceeding A.01-07-031, PG&E filed an Application requesting approval under Section 851 for two easements relating to the new Delta generation plant that is currently under construction. One easement was for an electric underground-to-overhead transition structure, while the other was for a gas pipeline and related valves. Prior to obtaining Commission approval, and in fact prior to filing its Application, PG&E allowed the foundations for the transition structure to be constructed, and the gas facilities to be constructed and placed in service. PG&E appears to have authorized this construction to occur on utility property under GO 69-C.

We must reiterate that it is improper to use GO 69-C to allow construction on utility property in anticipation of an Application under Section 851 for a sale or a lease of the property. Such construction is beyond the limited uses for which GO 69-C is intended. (*See*, D.01-03-064.) We understand that for a limited period of time the Commission, if not expressly condoning, did not expressly disapprove of this use of GO 69-C. However, in the past year, as discussed below, we have clearly signaled our intention to enforce the requirements of Section 851 and to preclude the use of GO 69-C as a means to evade the statutory requirements of Section 851.

Recent And Older Commission Decisions

Beginning in 1993, but most actively in 1996, the Commission approved a number of applications of Southern California Edison Company (Edison) under Section 851 for leases of space to telecommunications companies who wished to install fiber optic cables in Edison rights-of-way. (*See*, D.93-04-019, D.94-06-017, D.95-05-039, D.96-07-058, D.96-07-038, D.96-10-071, and D.96-11-058.) In all of these cases, Edison had granted the telecommunications company a license to use the utility right-of-way under GO 69-C prior to the filing of an application to

the Commission under Section 851. The Commission did not question the propriety of this practice in any of these cases.

On September 3, 1998, the Commission approved a “license and exchange agreement” between PG&E and Tele-Vue, which allowed each of them to use telecommunications facilities of the other, and also gave Tele-Vue access to certain of PG&E’s transmission towers and poles for installation of a new fiber optic line. (D.98-09-013.) The Commission did not appear to be troubled by the fact that PG&E and Tele-Vue had entered into an earlier version of the agreement in 1994, yet only sought Commission approval in 1998. During the interim period, PG&E had relied on GO 69-C as its authority for the agreement.

On February 18, 1999, the Commission addressed a more difficult case. PG&E disclosed that between 1989 and 1996, PG&E had entered into 106 sales agreements with individual customers for sales of utility assets, none of which had been approved by the Commission.¹¹ (D.99-02-062.) PG&E stated that it had been under the mistaken impression that Commission approval under Section 851 was not required, and requested either exemption from Section 851 or retroactive approval. According to PG&E, a 1996 decision¹² of the Commission caused PG&E to realize that Commission approval was required for the transactions, and it filed its Application seeking that approval in 1998.

ORA protested PG&E’s request for exemption from Section 851 under Section 853(b), but did not oppose retroactive application of Section 851 on a *nunc pro tunc* (i.e., with the same effect as if done earlier) basis, as the revenue

¹¹ The assets were electric and gas facilities that were used solely to provide service to an individual customer, and each sale was to that customer.

¹² D.96-02-054.

from the sales had been properly recorded and served to benefit ratepayers. ORA also requested that PG&E be required to conduct a search for other transactions made without 851 approval. The Commission largely adopted ORA's position, and retroactively approved the 106 transactions under Section 851 and ordered PG&E to search for additional transactions that had not been submitted to the Commission for approval.

PG&E found an additional 73 sales agreements, similar to the previous 106 sales agreements, and in January, 1999 filed an application again seeking an exemption from the requirements of Section 851, or in the alternative, retroactive approval under Section 851. The Commission found that PG&E's failure to obtain Section 851 approval for the sales was again a mistake, and issued a similar decision on April 22, 1999 retroactively approving the transactions under Section 851. (D.99-04-047.)

On March 4, 1999, the Commission approved conversion of a license granted by PG&E to Metricom under GO 69-C to a lease, pursuant to Section 851. Under the license agreement, and prior to the approval of the lease by the Commission, PG&E permitted Metricom to install 1,100 radio receivers on PG&E poles. Metricom wanted a lease, rather than a license, to ensure that its use of the poles would not be interrupted. The Commission did not question the propriety of this arrangement, and granted similar treatment to applications of PG&E to allow the City and County of San Francisco to use portions of PG&E's underground conduit (D.99-04-014, dated April 1, 1999), and to allow Electric Lightwave to use certain PG&E transmission towers, substations, and rights-of-way (D.00-01-014, dated January 6, 2000).

On August 5, 1999, the Commission struck a very different tone. Koch Pipeline Company sought authorization from the Commission under Section 851

for the already consummated sale of a crude oil pipeline to EOTT Energy Pipeline Limited Partnership. While the Commission did retroactively approve the transaction, it also fined Koch \$8,000 for its failure to get preapproval from the Commission. (D.99-08-007.) In levying the fine, the Commission found that there was no benefit to customers from the transaction, and that inadvertence was not an adequate excuse. The Commission stated that, “We must act to discourage parties from avoiding their statutory duty and bypassing the Commission when entering into agreements to transfer utility assets.”

On December 7, 2000, the Commission criticized the practice of a utility issuing a license under GO 69-C and then formally converting that same transaction into a longer term obligation under Section 851. (D.00-12-006.) In a case generally similar to the earlier ones addressed by the Commission, Edison granted a telecommunications company (in this case Telecom Licensing, Inc.) use of Edison facilities for fiber optic cables by means of a GO 69-C license that was to be converted to a lease via a Section 851 application. Based in part on concerns about possible evasion of environmental review, the Commission stated:

“GO 69-C cannot reasonably be read to allow utilities [to] bifurcate their transactions so that they would perform construction under an agreement not subject to Commission review by virtue of GO 69-C, and then, after the facilities are installed, seek approval of the lease arrangements for those facilities.”

In discussing the interplay of GO 69-C and Section 851, the Commission stated:

Public Utilities Code Section 851 generally requires advance Commission approval of the sale, lease, assignment, mortgage, disposal or encumbrance of utility property necessary or useful in the performance of its duties to the public. The use of GO 69-C to cement a deal in advance, then seek subsequent Section 851

review is troublesome. We do not believe that undertaking a commitment with long term implications is a 'limited use' that qualifies for GO 69-C treatment.

Nevertheless, based upon the "peculiar facts" of the case, the Commission approved the application. The Commission warned, however, that:

We specifically note that we will deny applications to convert GO 69-C agreements to lease agreements in the future, where the structure of those transactions was designed to circumvent the advance approval requirements of Section 851, and the associated CEQA review requirement.

On January 18, 2001, the Commission approved an application under Section 851 for Edison to lease utility land to Katella Operating Properties for a parking and storage facility. (D.01-01-043.) The Commission also reiterated its concern:

We note that SCE licensed the land to Katella pursuant to GO 69-C and the license agreement specifically contemplated the future conversion of the license into a lease. We are somewhat concerned with the apparent use of GO 69-C to seal a deal in advance, then seek subsequent approval under Section 851.

On March 27, 2001, the Commission strongly condemned the practice of utilities allowing construction to occur on utility land pursuant to GO 69-C in advance of obtaining Commission approval under Section 851, in a case in which it approved the sale of PG&E land to Storage Pro of Richmond for a parking and storage facility. (D.01-03-064.) The Commission stated:

We are troubled by the emerging pattern of a utility licensing property under GO 69-C as a precursor to a planned application for sale or lease of the property under Section 851. It appears that utilities may be using GO 69-C as means to give immediate

effect to transactions with third parties while awaiting Commission approval of a longer term arrangement.

The Commission continued, and described the proper scope of GO 69-C:

We do not agree with PG&E's assertion that the work performed falls under the "limited uses" described in the underlying general order. Here, PG&E entered into the License Agreement with the stated intention of selling the property. Thus, any work performed by Buyer on the property was most likely intended to be permanent rather than temporary. In contrast, GO 69-C requires that easements, licenses or permits "shall be made conditional upon the right of the grantor...to commence or resume the use of the property in question...." This provision makes it reasonable to conclude that when the general order describes "limited uses," it envisioned temporary ones, or at least uses which would not be incompatible with resumed use of the property by the utility.

While these decisions illustrate a recent trend in Commission proceedings, the issue presented is not a new one, and older examples abound. It appears that utilities have long resisted the requirements of Section 851. The Commission has rejected arguments from Southern California Gas and Kern River Gas Transmission that Section 851 can be evaded by transferring facilities before they are placed into service (D.93-02-055), from Edison and others that utility generation assets were no longer subject to the requirements of Section 851 as a result of market valuation under AB 1890 (D.95-12-063), from PG&E that Section 851 did not apply to sales of streetlighting facilities to municipal entities (D.84-10-059, citing D.83-06-096 and D.83-12-068), and from PG&E that

Section 851 did not apply to its allowing MCI to use space on its transmission facilities on the grounds that only a license was granted (D.92-07-007).¹³

Even though, based upon on the facts presented, we are granting PG&E's request for exemption from the requirements of Section 851, we need to acknowledge and address relevant language in recent Commission decisions that could act as a barrier to our approval of the Application.

As described above, in D.00-12-006 the Commission stated:

"We specifically note that we will deny applications to convert GO 69-C agreements to lease agreements in the future, where the structure of those transactions was designed to circumvent the advance approval requirements of Section 851, and the associated CEQA review requirement."

In D.01-03-064, the Commission restated this in even broader language:

"The Commission will deny future applications to encumber or dispose of utility property where the structure of the transaction was designed to circumvent the advance review requirements of Section 851 or the appropriate environmental review."

Application of Recent Precedent

In order to stay true to our word, we should deny this Application. PG&E and CalPeak entered into a license agreement under GO 69-C, and pursuant to that agreement, PG&E allowed CalPeak to begin grading and other construction activities on utility property. The intent behind the transaction, and the work begun by CalPeak, indicate a permanent (or at least longer term) commitment

¹³ In 1996, the Commission rejected a similar argument by Pacific Bell that leases of space in its office buildings did not require review under Section 851, as they were only licenses. (D.96-04-045.)

than that anticipated by GO 69-C. This is not an appropriate use of GO 69-C. Now, after entering into a transaction that the parties intended to be long-term, and after acting consistently with that intent by authorizing construction, PG&E wishes to gain Section 851 approval.

Nevertheless, we will grant the Application. In the two decisions in which we so unequivocally stated our intention to deny applications such as this one, the intent was to create a disincentive for this type of behavior. In essence, we were warning utilities that they would not be rewarded for failure to comply with all applicable authorities, but instead they would be punished by having their applications (which presumably they desired) denied. In this case, that approach has not succeeded, for despite the clarity of our previous decisions, PG&E did not file this Application until June 25, 2001. More significantly, denial of the Application would not really punish PG&E, but rather would most directly harm CalPeak, and secondarily harm the residents of California who may benefit from the operation of the CalPeak facilities. In short, our duty to the utility customers of California indicates that we should grant, rather than deny the Application.

At the same time, however, ensuring compliance with Section 851 and other laws and regulations is also part of our duty to uphold the public interest. Accordingly, we are issuing an Order to Show Cause to PG&E as to why it should not be found to have violated Section 851 (and related Commission decisions), Rule 1, and GO 69-C, and why corresponding sanctions should not be imposed. PG&E will provide to ALJ Allen the documents identified in Appendix A within two weeks of the date of this order. A hearing, to be held not less than two weeks from the date of this order, will be scheduled by separate ALJ Ruling. The hearing will be held in conjunction with a similar hearing to be

ordered in A.01-07-031. In order to ensure full development of the record, a representative from CalPeak with knowledge of the transactions shall attend the hearing.

This is an uncontested matter in which the decision grants the relief requested. Accordingly, pursuant to Section 311(g)(2) of the Public Utilities Code, the otherwise applicable 30-day period for public review and comment is being waived.¹⁴

Findings of Fact

1. California is currently experiencing an electricity crisis, and the Governor has declared a State of Emergency.

2. The Governor has issued Executive Order D-26-01, dated February 8, 2001, which determined that the energy supply emergency poses a threat to public health, safety, and welfare, and requires the siting of new powerplants that can be on-line to avoid electricity supply shortages this summer and next, and ordered State agencies to act expeditiously to accelerate the availability of new generation sources to the State.

3. Granting PG&E's Application would make additional electric generation sources available to the State.

4. PG&E has requested an exemption from the requirements of Public Utilities Code Section 851 pursuant to Public Utilities Code Section 853(b).

5. The scope of the exemption from Public Utilities Code Section 851 requested by PG&E is narrow, consisting of leases of designated land at three PG&E facilities to CalPeak.

¹⁴ We could also reach the same result pursuant to Rule 77.7(f)(9) of the Commission's Rules of Practice and Procedure, based upon public necessity.

6. CalPeak seeks to install a 49 megawatt combustion turbine peaking generation unit at each site.

7. Review and approval of the Application under Section 853(b) can be accomplished more quickly than review and approval of the Application under Section 851.

8. The Application was not protested.

9. PG&E permitted CalPeak to perform construction on PG&E property prior to approval of the Application.

Conclusions of Law

1. Public Utilities Code Section 853(b) provides for the Commission to exempt a public utility from the requirements of Public Utilities Section 851, and to place terms, conditions, rules and/or requirements upon any such exemption.

2. Exempting the Application from the requirements of Public Utilities Code Section 851 is in the public interest.

3. By virtue of the exemption from approval under Section 853(b), CEQA is not applicable to this Application.

4. Construction on utility property as occurred here exceeds the scope of authority granted by GO 69-C.

5. It cannot be determined with certainty from the record whether or to what extent PG&E violated state law or Commission authorities.

6. Further proceedings are appropriate to determine if PG&E has violated state law or Commission authorities, and, if so, whether PG&E should be sanctioned.

7. This order should be effective immediately to allow for expeditious installation of new generation.

O R D E R

IT IS ORDERED that:

1. Pacific Gas & Electric Company's (PG&E) request for an exemption from the requirements of Public Utilities Code Section 851 is granted.
2. The scope of the exemption from Public Utilities Code Section 851 is limited to the utility sites, leasehold interests, and purposes described in the Application, as discussed above.
3. The Commission retains its authority over PG&E, PG&E property, and ratemaking treatment of the leases, as discussed above.
4. PG&E will provide the information requested in Appendix A to Administrative Law Judge (ALJ) Allen within two weeks of the date of this order.
5. PG&E will show cause why it should not be subject to sanctions for violation of Public Utilities Code Section 851, General Order 69-C, Rule 1, and the Commission decisions cited above.

6. A hearing on sanctions, in conjunction with a similar hearing in Application 01-07-031, will be scheduled (by separate ALJ Ruling) not less than two weeks from the date of this order.

7. This proceeding remains open.

This order is effective immediately.

Dated August 23, 2001, at San Francisco, California.

LORETTA M. LYNCH
President
HENRY M. DUQUE
CARL W. WOOD
GEOFFREY F. BROWN
Commissioners

I dissent.

/s/ Richard A. Bilas
Commissioner

APPENDIX A

The following information and documents are to be provided to ALJ Allen as directed in the attached decision:

1. All written correspondence, including electronic correspondence, between PG&E and CalPeak relating to the leases or facilities discussed in the attached decision. "CalPeak" is to be interpreted broadly, and include any affiliated, predecessor, subsidiary, or parent entity and its representatives.
2. All written correspondence, including electronic correspondence, between PG&E and any governmental agency or entity (other than the CPUC) relating to the leases or the CalPeak facilities discussed in the attached decision.
3. All notes or other documentation of meetings, telephone conversations, and other oral communications between PG&E and CalPeak relating to the leases or facilities discussed in the attached decision.
4. All notes or other documentation of meetings, telephone conversations, and other oral communications between PG&E and any governmental agency or entity (other than the CPUC) relating to the leases or the CalPeak facilities discussed in the attached decision.
5. All PG&E internal written correspondence, including notes, memos, and electronic correspondence relating to CalPeak, or the leases or the CalPeak facilities discussed in the attached decision.
6. All notes or other documentation of internal PG&E meetings, telephone conversations, and other oral communications relating to the leases or the CalPeak facilities discussed in the attached decision.
7. Any documents that would have been responsive to this request that have been destroyed shall be identified as completely as possible, and the document retention or destruction policy under which they were destroyed shall be provided.
8. Paper copies of electronic communications (such as e-mail) shall be provided.

(END OF APPENDIX A)